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No. 93-1827

In The

Supreme Court of the United States

October Term, 1993

JERRY LOKAY,

Petitioner,

v.

AMERICAN REAL ESTATE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Ninth Court Of Appeals District Of Texas

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's arguments highlight why this Court should grant the petition. Equating the automatic exclusion under Texas Rule of Civil Procedure 215(5) with the sanction provided under Federal Rule of Civil Procedure 37(c)(1), Respondent fails to recognize the differences in standards between the Texas rule and the Federal rule. The use of automatic discovery sanctions will generate considerable nationwide controversy as more state courts adopt variations of Federal Rule 37(c)(1) as Texas has already done. How Due Process limits the use of these automatic discovery sanctions remains the question to be answered in this case. This Court has the opportunity to provide guidance to the courts of the various states in

formulating their procedural rules in a manner consistent with Due Process.

I. The Court Should Grant The Petition To Clarify What Due Process Limitations Exist As To Automatic Discovery Sanctions As This Issue Will Generate Nationwide Controversy In The Federal And State Courts.

Effective December 1, 1993, this Court adopted significant new amendments to the Federal Rules of Civil Procedure. Among these amendments, Rule 37(c)(1) Fed. R. Civ. P. now provides for a self-executing sanction preventing a party from using as evidence any witnesses or information that, without substantial justification, has not been disclosed or supplemented as required by Rule 26 Fed. R. Civ. P. (General Provisions Governing Discovery). However the Rule contains the following exception: " . . . *unless such failure is harmless.*" Rule 37(c)(1) Fed. R. Civ. P. [emphasis added]. The Committee Notes of the Advisory Committee on the Civil Rules point out that "[l]imiting the automatic sanction to violations 'without substantial justification,' coupled with the exception for violations that are 'harmless,' is needed to avoid unduly harsh penalties in a variety of situations: e.g., the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness a person so listed by another party; or the lack of knowledge of a pro se litigant of the requirement to make disclosures." See Notes of the Advisory Committee on the 1993 Amendment to Rule 37 [referring specifically to Rule 37(c)(1)].

In contrast, the express language of the Texas Rule 215(5) authorizes the trial court to impose a single sanction (exclusion of testimony). The good cause exception has been strictly limited by the Texas Supreme Court. "Good cause" is not lack of surprise, or lack of prejudice, uniqueness of evidence, or a fully deposed witness. *Alvarado v. Farah Mfg. Co., Inc.*, 830 S.W.2d 911, 915 (Tex. 1992). To the contrary, the Federal Courts have held that a plaintiff's good-faith oversight in failing to supplement discovery did not warrant the sanction of precluding eyewitness testimony. See *Outley v. City of New York*, 837 F.2d 587, 590 (2nd Cir. 1988); *accord Murphy v. Magnolia Electric Power Association*, 639 F.2d 232 (5th Cir. 1981). "Considerations of fair play may dictate that courts eschew the harshest sanctions . . . where failure to comply is due to mere oversight of counsel amounting to no more than simple negligence." *Outley v. City of New York*, 837 F.2d at 591; *c.f. Cine Forty-Second Street Theatre Corp. v. Allied Artists Picture Corp.*, 602 F.2d 1062, 1068 (2nd Cir. 1979). Rule 37(c) also allows the trial court to impose sanctions other than exclusion ("in lieu of or in addition to"). See Rule 37(c) Fed. R. Civ. P. Accordingly, significant differences exist between the Federal and Texas rule despite Respondent's assertions to the contrary.

Most states have a history of patterning state rules after the Federal civil procedure rules. Logically, it may be inferred that courts of various states will experiment with automatic discovery sanctions, as Texas has done. This Court has a great opportunity to provide guidance to these state courts to promulgate rules which will be consistent with Due Process.

II. The Court Should Grant The Petition To Clarify The Standard Of Due Process As Applicable To Sanctions Of Automatic Exclusion Of Evidence Under Federal And State Procedural Rules

Petitioner's claim in this petition centers on a procedure which can be invoked at any stage of the proceedings, without prior notice to the Petitioner, that automatically excludes crucial evidence, with no discretion of the court and no other choice of sanctions. "Mere legislative fiat may not take the place of fact in the determination of fact in the determination of issues involving life, liberty or property." *Manley v. Georgia*, 279 U.S. 1 (1929).

Petitioner's claim is more than a mere cry of "it's not fair." The Texas procedural rule provides:

> A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response or to offer the testimony of an expert witness or of any other person having knowledge of discoverable matter, unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

Tx. R. Civ. Proc. 215(5).

Thus the typical good cause hearing begins with the requirement that evidence must be excluded. There is no discretion of the court and no lesser sanction provided. *Alvarado v. Farah Manufacturing Co., Inc.* 830 S.W.2d 911,

914 (Tex. 1992). Where the information was disclosed, the question then centers on whether it was done in a particular manner. If it was not done in a particular manner, the sanction is still automatic; the presumption is that the evidence must be excluded. Texas Rule 215(5) provides only one sanction, and the courts are not free to disregard its language. *Alvarado*, 830 S.W.2d at 915. To overcome the presumption that the evidence must be excluded, Petitioner must establish "good cause sufficient to require admission of the evidence." However, under the Texas rule this is an unduly onerous burden, if not an impossible one. The rule itself is silent in defining "good cause." Thus Petitioner is without notice of what is sufficient to carry the burden of establishing that the evidence must be admitted. Moreover, the Texas Supreme Court has not defined the term "good cause sufficient to require admission." A party must necessarily guess at its true meaning and argue for admission of the evidence anyway.

Contrary to the Respondent's assertion, the "good cause" hearing did not satisfy Due Process. "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment." *Western & A.R. Co. v. Henderson*, 279 U.S. 639, 642 (1929). The operation of Texas Rule 215(5) violates the due process clause of the 14th Amendment because the presumption, automatic exclusion of evidence, together with the failure to define what constitutes "good cause" under the rule "operates to deny a fair opportunity to repel" the presumption. Petitioner was effectively without notice of what was

necessary to repel the presumption of automatic exclusion.

"The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing'." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978). When disclosure is made, but the question centers on the manner of disclosure, the party opposing the introduction of evidence should object in advance of trial to give sufficient notice to permit adequate preparation for a hearing on the imposition of sanctions. However, under the operation of Texas Rule 215(5), the exclusion of crucial evidence can be obtained moments before trial, without prior notice, as in Lokay's case. The exclusion is not based on the probative value of the evidence, nor its reliability, nor upon any consideration whether there has been any harm to the opposing party, but only on the basis of an automatic sanction. It is inflexible in its operation, and unjust in its effect on the litigant's right to present all of the evidence supporting his claim for a decision on the merits.

In the *Memphis Light* case, Mrs. Craft had numerous talks with officials of the power company to prevent a utility termination, but the cut-off procedure was held unconstitutional because of lack of notice of the availability of a method to protest the company's action. In Lokay's case, while a "good cause" hearing occurred, it was meaningless, because the standard of "good cause sufficient to require" admission of the evidence is not defined. By the continuing litigation over the years in which the Texas Supreme Court has failed to define the term in more than ten cases in which it has heard the

issue, it is clear that the term "good cause" used in Texas Rule 215(5) is one that "[M]en of common intelligence must necessarily guess at its meaning and differ as to its application. . . . " *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964).

A hearing without meaning does not satisfy Due Process. To satisfy the mandates of the Due Process clauses of the Fifth and Fourteenth Amendments, a party must be afforded a hearing "at a meaningful time and in a meaningful manner." A hearing without prior notice sufficient to permit adequate preparation, and without notice of a defined standard which must be met in order to repel a presumption or to obtain relief, is meaningless, and amounts to a denial of Due Process.

Discovery sanctions must comport with requirements of Due Process. *Societe Internationale v. Rogers*, 357 U.S. 197 (1958). The Texas Rule 215(5) does not. It permits surprise attacks to exclude crucial evidence. It creates a presumption which requires exclusion of evidence that under the Texas case decisions is virtually irrebuttable. It permits important claims to be decided, not on the merits of the case, but on the basis of an inflexible procedural rule. The attempt to afford a "good cause" determination does not afford a meaningful hearing at a meaningful time.

The history of sanction litigation in Texas demonstrates that unless clear definition is given to establish Due Process requirements, sanction litigation in the Texas courts will become a model of continuing injustice. Moreover, since many states model their procedural rules after federal rules of procedure, the availability of sanctions, particularly those of automatic operation, will have a

great effect on the rights and claims of litigants in the nation. Texas has found the effect. "The greater availability of sanctions began to shift the focus of litigation away from trial of the merits of the case and toward pretrial accusations of rules violations. Rather than simply assuring more careful compliance with rules to achieve a better adjudication of case before juries, sanctions litigation commanded an entire arena of its own, often wholly unconnected with the merits of the case, yet influencing its outcome." Hon. Nathan L. Hecht, *Foreword to Avoiding Sanctions: Trying to Dodge the Bullet*, 25 Texas Tech Law Review 1 (1993).

The operation of Texas Rule 215(5) is a model of continuing injustice. It denies Due Process. This Court now has the opportunity to clarify the standard of Due Process as applicable to sanctions of automatic exclusion of evidence, and to provide a model of justice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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